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January 26, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

In Re: **Ex Parte Presentation in GN Docket No. 93-252 (Implementation of §3(n) and §332 of the Communications Act — Regulatory Treatment of Mobile Services)**

Dear Mr. Caton:

On January 25, 1994, Michael Kennedy, Joe Vestal and counsel, had three separate meetings with Byron Marchant, Karen Brinkmann and Brian Fontes on behalf of Motorola to discuss issues relating to the regulatory treatment of private land mobile services. The topics covered are addressed in Motorola's Comments and Reply Comments submitted in this proceeding. In addition, the following briefing papers were distributed and, therefore, should be associated with GN Docket No. 93-252.

Please call me at (202) 371-6899 should you have any questions on this matter.

Sincerely,

Mary E. Brooner

Mary E. Brooner
Manager, Regulatory Relations

MEB:amdes

Enclosures

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List ABCDE

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THE FCC'S REGULATORY PARITY TRANSITION POLICIES WILL EFFECT THE FUTURE HEALTH AND GROWTH OF SMR SERVICES

SMR Services Are In a Critical Period as a Source of Improved Wireless Communications Services to Consumers. SMR operators have available advanced technologies that they can deploy to produce dramatic increases in spectrum efficiency and capacity. Digital modulation techniques and frequency reuse architectures promise to provide a six- to fifteen-fold improvement in SMR capacity. However, the SMR industry is in a very sensitive and highly vulnerable period of its development because there is fierce competition for capital among new wireless services and entrenched wireless services such as cellular.

The Congressionally Mandated Three Year Transition Period Is Imperative for Any Private Radio Service Reclassified as Commercial Mobile Services to Prevent Disruption of Service to the Public and Long Term Damage to the Industry. Congress recognized that a flash cut imposition of Title II common carrier regulation upon any private radio service reclassified as a Commercial Mobile Service ("CMS") would be inequitable and potentially harmful to users of mobile services. This three year transition period is unquestionably essential to prevent adverse impact upon the industry, its licensees, and its subscribers for several reasons:

- ***Disrupting Services to Subscribers.*** The immediate imposition of common carrier regulation upon SMRs will require a complete reevaluation of rates, terms and conditions of all services offered to all customers. This could compel the cancellation or modification of current agreements governing the provision of service and equipment without adequate lead time to subscribers and licensees.

- ***Imposing Regulatory Burdens and Costs for Which The Industry is Unprepared.*** Flash cut imposition of Title II obligations would immediately expose SMRs to a panoply of new obligations and expenses without adequate time to adapt and adjust. For example, SMRs would be subject to equal access, resale, TOCSIA, CPE bundling, Telecommunications Relay Service, and hearing impaired compatibility requirements which would require fundamental technical and business alterations.

- ***Ensuring Equipment Compliance.*** Equipment manufacturers must have time to assess a new set of technical requirements to ensure compliance with the FCC's equipment authorization program in the new CMS environment. Equipment may need to be redesigned to meet new CMS requirements. While manufacturers of wireless equipment have met common carrier design standards for cellular service, the technologies used for private mobile services such as advanced SMR systems are different.

- ***Impairing Access to Capital Markets.*** Flash cut imposition of common carrier regulation on SMRs will create confusion and uncertainties that would impair the industry's ability to attract continued capital investments.

Without an adequate transition period, SMRs would be expected to change overnight the basic industry policies and practices that have been relied upon for nearly twenty years. This would be neither reasonable nor contemplated by Congress in enacting the Omnibus Budget Reconciliation Act of 1993.

Congress Clearly Intended to Afford a Three Year Transition Period for Any Services Reclassified as CMS by the Commission. Under Section 6002(c)(B) of the Omnibus Budget Reconciliation Act "any private land mobile radio service provided by any person" before the August 10, 1993, enactment of the legislation, and "any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall . . . be treated as a private mobile radio service until [three] years after such date of enactment."

The term "service" is used in this context to describe broad mobile radio categories established by the Commission rather than specific licenses or licensees. The legislative history mandates this interpretation by discussing the grandfathering period in terms of persons providing service as opposed to the individual licensed facilities held by such persons. The legislative history explicitly states that "any person that provides private land mobile services before such date of enactment shall continue to be treated as a provider of private land mobile service until [three] years after enactment." Further, the Conference Report makes clear that the specific reference to paging services was necessary to ensure "that if a paging service that was not offered prior to the enactment of this section is offered in a state that restricts entry for common carriers, and the Commission's regulations preempting such state entry regulations [have] not taken effect, the paging service is not to be treated as a common carrier" subject to state entry regulation.

The Commission Should Summarily Reject Claims that the Three Year Transition Period Does Not Apply to Licenses for ESMR Transmitters that Were Not Operational as of the August 10, 1993, Enactment Date. ESMRs are not "new" services. ESMR is a descriptive term coined by the industry to describe wide area SMR systems using the latest in digital technology. The Commission supported this development without changing any of its SMR rules. Today, about 1.5 million subscribers operate on the nearly 3,000 operational SMR systems. Most of these are small with no more than ten channels available. It is this lack of capacity that led some SMR operators to transform their existing holdings into advanced digital networks.

Enhanced SMR services are offered through numerous individual transmitters that are combined into broad regional networks. Congress obviously was aware of that fact in enacting the Budget Act and just as obviously could not have intended the anomalous result of treating some parts of an integrated network as warranting a three year transition period while newly added transmitters essential to growing a service area and meeting consumer needs would not be entitled to any transition period. This mixing and matching would be illogical and precisely the type of implementation problem that the legislation avoided by speaking broadly in terms of "persons" providing service rather than "licenses" or "transmitters" held by such persons.

THE BOUNDARY LINE BETWEEN PRIVATE LAND MOBILE AND COMMERCIAL MOBILE SERVICES MUST BE CAREFULLY DRAWN TO AVOID UNINTENDED AND UNDESIRABLE EFFECTS ON SPECTRUM USERS

Industrial, Business, Educational and Public Safety Organizations Rely Upon the Ability to Share Systems or Use Excess Capacity to Recoup Costs In Purchasing New Communications Equipment. The Commission has long recognized that licensees in the private radio services can often satisfy their communications needs with dedicated private systems as opposed to purchasing capacity from for-profit service providers such as SMRs or cellular carriers. For more than 25 years, the Commission has allowed the operators of these private communications systems to share systems and to recoup costs associated with building and operating such networks by selling excess capacity to other eligible users. Over the years, such arrangements have proven beneficial to spectrum management by allowing multiple users to share single frequencies. Today, there are more than 600,000 non-SMR systems authorized under the private land mobile service rules that provide essential communications services to more than 15 million mobile radios.

There is Wide Agreement in the Wireless Communications Industries That Many Important Private Radio Uses Should Not be Classified as Commercial Mobile Service ("CMS"). In its regulatory parity comments, Motorola argued that the preponderance of existing private radio services should continue to be classified as private mobile. The services identified by Motorola as warranting private status include:

- ***"Purely Private" Internal Communications Systems:*** Stations intended to satisfy the internal communications needs of a single entity.

- ***Non-Profit Sharing Arrangements:*** Two or more eligible users sharing the costs of construction, operation, and maintenance of communications facilities that are intended to satisfy their internal communications needs.

- ***Stations Managed by a Third Party for a Fee:*** Contractual arrangements between licensees and third parties for the day to day maintenance of communication facilities intended to satisfy internal communications needs.

- ***Ancillary Offerings to Third Parties of Excess Capacity of Internal Systems:*** Sharing arrangements between licensees and other eligible users to provide excess capacity in exchange for a fee.

- ***Community Repeaters:*** Facilities shared by eligible users and managed by a third party for a fee. These systems typically operate on single frequencies. The average number of mobile radios operating on such systems is about 50.

As a whole, the mobile communications industries echoed Motorola's demarcation between private mobile and commercial mobile services. Few, if any, argued that these services are functionally equivalent to cellular radio service or other established common carrier services.

This Classification of Private Mobile Services Would Be Fully Consistent With the Definitional Standard Enacted by Congress. In distinguishing commercial mobile services and private mobile services, congress enacted a three prong test to define commercial mobile operations. First, the service must be offered on a for-profit basis. Second, the service must be interconnected with the public switched telephone network. Third, the service must be made available to a broad segment of the public.

Few, if any, existing private land mobile services satisfy this statutory definition of commercial mobile service. Most private systems, of course, are not made available on a for-profit basis. Interconnection with the public switched telephone network is a highly regulated activity on private frequencies, and, in major metropolitan areas, it is difficult to obtain such authority. Also, many private radio services are subject to eligibility requirements and are not available to broad segments of the public. A local government agency, for example, seeking to recoup costs of installing an advanced mobile communications system could only sell excess capacity to a like eligible in the Local Government Radio Service. For the most part, therefore, most private mobile services do not satisfy the statutory definition of commercial mobile service.

The Legislative History of the Budget Act Confirms That Congress Intended to Have the FCC Allow Mobile Services to be Classified as Private if They Were Not the "Functional Equivalent" of Commercial Mobile Services. Even if it could be argued that some private land mobile services satisfy the statutory definition of CMS, it is clear that they are not the functional equivalent of other for-profit services such as cellular, PCS, and wide area advanced digital SMR service. As such, Congress intended for such services to be classified as private mobile.

The legislative history makes this point clear. In the Conference Report to the legislation, Congress informs the FCC that it "may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area." In view of this clear intent, it is imperative that the FCC reject the arguments of those who claim that the functional equivalent concept is designed to expand the scope of commercial mobile regulation.